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No. 92-1833

In The

Supreme Court of the United States

October Term, 1992

ROLF LARSEN,

Petitioner,

v.

JUDICIAL INQUIRY AND REVIEW BOARD OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF FOR THE RESPONDENT IN OPPOSITION

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38 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the fact that the Respondent Board, in accordance with the Pennsylvania Constitution and the Rules promulgated pursuant to the constitutional mandates, investigates charges against a member of the judiciary, prefers charges and holds evidentiary hearings, and, when appropriate, suggests recommended findings and sanctions to the Supreme Court raises due process concerns where the Pennsylvania Constitution expressly requires its Supreme Court to conduct its own review of the record and to make the final adjudicative decision as to whether or not a judicial officer has violated the Constitution or the Code of Conduct and, if so, what level of discipline is appropriate.

II. Whether Petitioner's claim that, during judicial disciplinary proceedings involving Petitioner, the Respondent Board amended the charges to issue additional charges constitutes a violation of the Double Jeopardy clause which protects a criminal defendant from being retried for the same criminal offense has any basis in law or, on this record, in fact.

III. Whether the fact that, during judicial disciplinary proceedings initiated against Petitioner a justice of the state's highest court, for, *inter alia*, *ex parte* communication to a lower court judge regarding a matter then before the lower court, the Respondent Board amended the charges to include additional *ex parte* communications under similar circumstances raises due process concerns where such amendments were authorized by the rules of procedure promulgated by the court on which Petitioner sits and Petitioner had more than ample time to prepare and present his defense against the additional charges.

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OPINIONS BELOW

The Final Report and Recommendation of the Respondent Judicial Inquiry and Review Board is set forth in the Petitioner's Appendix pp. 9-71, 74-150. The Order of the Pennsylvania Supreme Court adopting the Board's recommendation that Petitioner be publicly reprimanded for violating the Code of Judicial Conduct is reported at ___ Pa. ___, 616 A.2d 529 (1993), and is set forth in Petitioner's Appendix pp. 7-8. The Order of the Pennsylvania Supreme Court denying Petitioner's petition for reargument is reported at ___ Pa. ___, ___ A.2d ___, (1993) and is set forth in Petitioner's Appendix pp. 1-6.

JURISDICTION

The final judgment of the Pennsylvania Supreme Court was entered on January 22, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article V, Section 18 of the Constitution of Pennsylvania, provides in pertinent part:

> § 18. Suspension, removal, discipline and compulsory retirement.
>
> (a) There shall be a Judicial Inquiry and Review Board having nine members as follows: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.

(b) . . . The board shall act only with the concurrence of a majority of its members.

. . . .

(d) Under the procedure prescribed herein, any justice or judge may be suspended, removed from office or otherwise disciplined for violation of section 17 of this article, misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute, and may be retired for disability seriously interfering with the performance of his duties.

(e) The board shall keep informed as to matters relating to grounds for suspension, removal, discipline, or compulsory retirement of justices or judges. It shall receive complaints or reports, formal or informal, from any source pertaining to such matters, and shall make such preliminary investigations as it deems necessary.

(f) The board, after such investigation, may order a hearing concerning the suspension, removal, discipline or compulsory retirement of a justice or judge. The board's orders for attendance of or testimony by witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings.

(g) If, after hearing, the board finds good cause therefor, it shall recommend to the Supreme Court the suspension, removal, discipline or compulsory retirement of the justice or judge.

(h) The Supreme Court shall review the record of the board's proceedings on the

law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper.

. . .

(j) The Supreme Court shall prescribe rules of procedure under this section.

. . .

The Rules of Procedure governing the Judicial Inquiry and Review Board promulgated by the Pennsylvania Supreme Court and applicable to the proceedings below, provided in pertinent part:

Rule 1. Preliminary Investigation

(a) The Board, of its own volition, or upon receiving a statement not obviously unfounded or frivolous, alleging facts indicating that a judge may be subject to suspension, removal, discipline or compulsory retirement upon the grounds specified in Article V, Section 17-18 of the Constitution of the Commonwealth of Pennsylvania, or for violations of the Canons of legal or judicial ethics or Standards of Conduct prescribed by the Supreme Court, shall make a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held.

. . .

Rule 2. Notice of Formal Proceedings

(a) After the investigation has been completed, if the Board concludes that formal proceedings should be instituted, the Board shall without delay issue a written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him.

. . .

Rule 5. Hearing

(d) The hearing shall be held before a Committee of the Board consisting of not less than three (3) members, at least one of whom shall be a judge.

. . .

Rule 8. Amendments to Notice or Answer

The Board, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

. . .

Rule 9. Report of Committee to Board

(a) After the conclusion of the hearing before the Committee of the Board, the Committee shall promptly prepare and transmit a report to the Board.

(b) Upon receiving the report of the Committee, the Board shall make its findings and report and promptly mail a copy to the judge.

. . .

Rule 14. Board Vote

If the Board, upon consideration of the record of the proceedings, finds good cause, it shall recommend to the Supreme Court

> the suspension, removal, discipline or compulsory retirement of the judge. The affirmative vote of a majority of the Board shall be necessary for such recommendation or for dismissal of the proceedings. A member of the Board may not abstain from voting.
>
> . . .
>
> Rule 18. Disposition
>
> The Supreme Court shall review the record of the Board's proceedings on the law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper, or may refer the matter back to the Board for further proceedings.

COUNTERSTATEMENT OF THE CASE

This case involves judicial disciplinary proceedings resulting in the issuance of a public reprimand to Petitioner, a justice of the Pennsylvania Supreme Court, the state's highest appellate tribunal. The reprimand was issued by the Pennsylvania Supreme Court following its review of proceedings conducted by the agency entrusted by the State Constitution with investigating alleged judicial misconduct, the Judicial Inquiry and Review Board.

Pennsylvania's procedures are set forth in the Constitutional and statutory provisions involved, *supra*, pp. 1 to 5.[1] The Constitution and the Rules provide for a nine member Review Board constituted of five judges, two attorneys and two lay people and charges it with keeping informed as to matters relating to grounds for judicial

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[1] They are substantially identical to those found in approximately 24 other states, see discussion below, pp. 13-14.

discipline and with receiving complaints or reports regarding such matters. The Board is required to conduct investigations and, when appropriate after such investigation, to issue charges and hold hearings and, if after such hearing, it finds good cause, it is mandated to recommend discipline to the state's Supreme Court. The Court must conduct its own *de novo* review of the record of the Board's proceedings and make its own determinations on the facts and the law and accept, reject or modify the Board's recommendation as it, the Supreme Court, finds just and proper.

The Proceedings before the Board involving Petitioner were initiated on May 24, 1988, with the issuance, by the Board, of a Notice of Formal Proceedings notifying Petitioner that proceedings had been instituted on two charges of misconduct one of which concerned allegations that Petitioner had initiated an *ex parte* contact with a lower court judge concerning a matter then before the judge. Petitioner answered the Notice and Charges with a simple denial, and a hearing on the charges was begun on August 22, 1988.

Following nine days of hearings before a hearing panel of three members of the Board during August and September, the hearings were adjourned on September 14, 1988 with a planned resumption on October 5, 1988. Petitioner had not testified but was expected to testify on his own behalf when the hearings resumed.

Following the adjournment on September 14, and prior to the planned resumption of the proceedings on October 5, Board Counsel obtained information independently of the hearing which indicated a possible need for additional related charges involving *ex parte* contacts by Petitioner with a second lower court judge concerning matters then before the judge.

Board Counsel reported the information, obtained in interviews of September 27, 29, and 30, to the Chairman of the Board and a meeting of the Board was held on

Monday, October 3, to consider what action, if any, the Board should take. Only three Board members were available to participate. At the time, there was one vacancy on the nine member Board. Two members of the Board were recused because they were witnesses in the proceedings. Because Petitioner previously had objected to the participation of the hearing panel members in Board deliberations concerning him, the three hearing panel members chose not to participate in this vote.[2] Therefore, the remaining three Board members considered the matter and voted to amend the previously served Notice of Institution of Formal Proceedings by setting forth three additional charges alleging *ex parte* contacts.

The Board's action was taken pursuant to Rules 2 and 8 of the J.I.R.B. Rules of Procedure set forth, *supra* at pp. 3, 4. Rule 8 provides that, if the Notice of Formal Proceedings is amended, a respondent "shall be given reasonable time. . . . to prepare and present his defense against the matters charged thereby". Anticipating that Petitioner would request additional time, Board Counsel suggested to Petitioner's Counsel that the hearing scheduled for October 5, 1988, be replaced with a conference call with the hearing panel, and stated that Board Counsel would join in any request to the Board for a continuance.

Petitioner's Counsel agreed to the conference call procedure and, in the call with the hearing panel, argued that Rule 8 does not permit the procedure followed by the Board. Petitioner's Counsel also raised the question whether three members of the Board could act under such circumstances. Finally, he asked for the opportunity to present legal arguments before the entire Board.

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[2] Their participation would have been totally appropriate under the applicable Rules and the applicable legal precedents, see discussion below at pp. 13-18.

Following the conference call argument, the hearing panel consulted and, later the same day, directed Board Counsel to arrange a conference call with the three members of the Board who had issued the amendment pursuant to Rule 8 to permit presentation of Petitioner's arguments. The call was held the next morning, October 6. Following argument, the three Board members ordered that argument be heard before the entire Board on October 10, 1988.[3] The six non-recused members of the Board heard three and one-half hours of argument on the issues and unanimously issued an order (Pet. App. p. 286) stating, *inter alia*, that the charges issued on October 3, 1988, were correctly and properly issued and that the charges filed on October 3, 1988, shall be deemed to have been filed pursuant to Rule 2 (which provides for 20 days to answer a Notice of Formal Proceedings) rather than Rule 8 (which provides for a "reasonable" time to answer). The Order also stated:

> (3) In the event the Board concludes a hearing is necessary concerning the October 3, 1988, charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard *ab initio* by the six sitting members. In the interim, the Board directs the panel currently hearing Board Matter 140 to suspend hearings on the matter.

Petitioner filed an application with the Board challenging the Board's actions and, when the Board denied the application, he filed an application for extraordinary relief with the State Supreme Court challenging the procedures. A stay was issued by one Justice, but was ultimately vacated by action of the Court. Petitioner then filed an action in the United States District Court for the

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[3] At Petitioner's request, the two recused members were asked to participate. Both declined.

Middle District of Pennsylvania challenging the Board's procedures. The Court denied Petitioner's request for a temporary restraining order.

The Proceedings below then resumed on November 14, 1988. Neither Petitioner nor his regular counsel, Mr. A. Charles Peruto, was present. However, Petitioner was represented by other counsel who entered Mr. Peruto's trial schedule as an exhibit and then objected to the hearing going forward on various grounds. The Board overruled the objections and the Chairman then stated (Notes of Testimony 1824, *et seq.*):

> . . . [S]o far as a continuance is concerned, the continuance is granted in light of Mr. Peruto's unavailability since he is engaged in a trial in progress in the Federal Court which will not be over until December 2nd.
>
> We do want to, however, schedule some days for hearing, and we would appreciate it if you would ask Mr. Peruto and Justice Larsen if they would let us know what parts, if any, of the previous hearing they expect to enter into the record here without redoing it, if there is any. In fact, what I would propose is that we order [Board Counsel] to meet with Mr. Peruto or whoever Mr. Peruto designates to meet in his stead sometime during this continuance which will be granted, to reach agreement, if possible, on those parts of the record, if any, which respondent agrees should be made part of the record of this hearing, and so that it is clear, our order is that this hearing is *de novo* and, therefore, the respondent will have to consider what parts, if any, of the previous hearing on charges one and two should be made part of the record of this hearing . . .

The hearing was then recessed until January 5 and, by later Board order, was further continued until March 13, 1989. At that time, Petitioner stipulated that the

record made before the original hearing panel would be incorporated into the record being made before the *en banc* hearing panel and the proceedings resumed with Board Counsel presenting evidence related to the additional three charges. (See Notes of Testimony set forth in the Appendix, *infra* at p. 4a.) Eight additional days of testimony were held between March 13, 1989, and April 21, 1989, when the record was closed. Upon motion of Petitioner, the record was reopened for a hearing on June 10, 1989. Following the exchange of proposed findings by both Petitioner and Board Counsel, oral argument was heard on July 25, 1989. The Board then undertook its review of the record and the arguments made.

In April, 1990, the Board issued its proposed determination or recommendation. It found that one of the two original charges had been established by clear and convincing evidence, that the other did not, as a matter of law, constitute judicial misconduct and that the three additional charges had not been established by clear and convincing evidence. The recommendation was joined by eight members of the nine member Board with one Board member dissenting from the finding of misconduct.[4]

Under the Board's procedures, oral argument was heard by the Board on objections to the Board's proposed

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[4] During the pendency of the hearings, one Board member had resigned. He was replaced by Judge Charles Durham who was appointed on December 9, 1988. Two Board members had recused themselves and, when their terms ended, they were replaced by Superior Court Judge John Kelly who was appointed on December 9, 1988, and by Judge Jess Jiuliante who was appointed on March 15, 1990. Since the members they were replacing were, for the reasons noted, unavailable to participate in this matter, Judges Kelly, Durham and Jiuliante became members of the Board participating in Board Matter 140. Judge Durham died before the board's final determination and was replaced by Judge Joseph James.

report. Following its consideration of the arguments of Petitioner and Board Counsel, the Board reaffirmed its earlier determinations and filed its Report and Recommendation with the Supreme Court on July 17, 1991. The Board's report consisted of three parts: two opinions joined by four members each which found that one of the original two charges had been established by the evidence, that the conduct charged in the other original charge did not, as a matter of law, constitute judicial misconduct, and that the evidence was insufficient as to the three additional charges[5] and a dissenting opinion by one member who found that no misconduct occurred. The eight members who determined that the evidence did establish misconduct recommended the sanction of public reprimand.

Upon receipt of the Board's recommendation, the Supreme Court noticed a briefing schedule and heard oral argument. On October 14, 1992, the Court issued its order adopting, by reference and by including it as an appendix to its Order, the findings and recommendation of the Board as set forth in one of the two majority opinions. Petitioner filed a motion for reargument which was denied by the Court.

SUMMARY OF ARGUMENT

I. The procedures mandated by the Pennsylvania Constitution which require the Respondent Board to investigate allegations of judicial misconduct, to order and hold evidentiary hearings on such allegations when the Board deems it necessary, and to make disciplinary recommendations to the State Supreme Court if the Board

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[5] As noted by the authors of one of the two opinions, the "principle point of divergence" between the two reports is the treatment of the character evidence submitted by Petitioner (Pet. App. pp. 22-23).

believes the evidence produced at the hearing establishes misconduct do not constitute impermissible commingling of investigative, prosecutorial, and adjudicative functions because the State Supreme Court, not the Board, is the final adjudicative authority and the Court is required to conduct its own *de novo* review of the record. Similar procedures are in effect in approximately 24 states and "commingling" attacks on this structure of judicial discipline have been rejected by every court which has considered the question, including this Court.

II. The issuance of additional charges in the proceedings below raises no double jeopardy or other constitutional issue. Judicial disciplinary proceedings are not criminal proceedings and do not involve criminally punishing an individual. Such proceedings are to protect the integrity of the judicial system, not to determine criminal guilt, and double jeopardy concepts do not apply. Moreover, Petitioner was not tried a second time on the original charges since he stipulated that the record created in the hearing as to those charges before the original hearing panel be incorporated into the *de novo en banc* hearing ordered by the Respondent Board as to all the charges and, under the constitutionally mandated procedures, it is the Board, and not a hearing panel, who must make the determination as to whether or not to recommend disciplinary action to the State Supreme Court.

III. These latter considerations also provide an answer to the Petitioner's allegations that the Board improperly issued additional charges during the proceedings below and that this prejudiced him. The actions of the Board conformed with its Rules and Petitioner can demonstrate no prejudice from the issuance of additional charges in light of the proper roles of the Board and the State Supreme Court. The procedures followed by the Board in amending the original charges have been validated by every court that has considered them against challenges similar to Petitioner's and the Board was

properly fulfilling its constitutionally imposed responsibilities in pursuing additional instances of possible judicial misconduct. The charges were based on information developed independently of the ongoing proceedings, were issued before Petitioner testified and Petitioner had more than ample time, approximately five months, to meet and defend against the additional charges. Thus, Petitioner was provided procedural due process.

ARGUMENT

I. THE PROCEDURES OF THE BOARD AS MANDATED BY THE STATE CONSTITUTION DO NOT CONSTITUTE IMPERMISSIBLE COMMINGLING OF INVESTIGATIVE, PROSECUTORIAL AND ADJUDICATIVE FUNCTIONS

Petitioner's contention that the procedures mandated for the Respondent Board by the Constitution of Pennsylvania are constitutionally invalid in that they provide for a commingling of investigative, prosecutorial and adjudicative functions has previously been rejected by this Court. In *White v. Judicial Inquiry and Review Board*, 488 U.S. 805 (1988), the Appellant challenged the decision of the Pennsylvania Supreme Court in *In re Cunningham*, 517 Pa. 417, 538 A.2d 473 (Pa.1988), which removed him from office following disciplinary proceedings before the Respondent Board. The appeal, based primarily on the commingling issue, was dismissed by this Court for want of a substantial federal question.

The contention remains without merit.[6] In addition to its rejection by this Court, it has been rejected in every

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[6] The contention as to Pennsylvania's disciplinary system will also soon be moot. On May 18, 1993, the voters of Pennsylvania approved a constitutional amendment which will, *inter alia*, create a two-tier disciplinary system by providing for a Judicial Conduct Board to exercise investigative and prosecutorial functions and a separate Judicial Court to hear charges brought by the Board.

state with a scheme of judicial discipline similar to Pennsylvania's. The Board's procedures mandated by Article V, Section 18, of the State Constitution and by the Rules are identical to those presently found in approximately 24 jurisdictions, see *In re Hanson*, 532 P.2d 303 (Alas. 1975), in which the Supreme Court of Alaska, after reviewing the history of "commingling" attacks on this structure of judicial discipline, concluded that the argument has been rejected by "all courts which have considered the question." See, *e.g.*, *In re Inquiry Relating to Rome*, 218 Kan. 198, 542 P.2d 676 (1975); *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977); *In re Brown*, 512 S.W.2d 317 (Tex. 1974); *In re Mills*, 539 S.W.2d 447 (Mo. 1976); *In re Diener and Broccolino*, 268 Md. 659, 304 A.2d 587 (1973).

In the *Rome* case, the Supreme Court of Kansas rejected the "commingling" argument with the following language:

> "We think that reposal in the Commission of the dual functions of investigations and in making findings and recommendations . . . does not result in a biased or partial tribunal violative of the judge's Constitutional procedural right. The Commission's findings and recommendations are advisory only." 542 P.2d at 684.

Similarly, the Supreme Court of North Carolina in the *Nowell* case, *supra*, held that " . . . [a]n agency which has only the power to recommend penalties is not required to establish an independent, investigatory and adjudicatory staff." The Supreme Court of Texas in the *Brown* case, *supra*, wrote that "any alleged partiality of the Commission is cured by the final scrutiny of this adjudicative body."[7]

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[7] The Pennsylvania Supreme Court has repeatedly stressed the merely advisory nature of the Board's recommendations, See, *e.g. In re Glancey*, 515 Pa. 201, 527 A.2d 997 (1987); *In re*

The due process "commingling" argument in the circumstances presented here has also been rejected by all the federal courts in which it has been advanced, including, of course, this Court. In *Roy v. Jones*, 349 F.Supp. 315 (W.D. Pa. 1972), *aff'd. on other grounds*, 484 F.2d 96 (3d Cir. 1973), the District court wrote, " . . . [e]ven if the Board is biased, which this Court finds it is not, the determination made by the Board will not be a final adjudication; it will merely be a recommendation which may be approved or disapproved by the Supreme Court [of Pennsylvania]", quoting *Keiser v. Bell*, 332 F.Supp. at 608 (E.D. Pa. 1971).[8]

Cunningham, 517 Pa. 417, 538 A.2d 473 (Pa.1988); *In re Chiovero*, 524 Pa. 87, 570 A.2d 57 (1990). In *Glancey, supra*, the Court stated (527 A.2d at 1005):

> . . . [T]he Board's recommendation has no binding effect on this Court; it is merely advisory at best, and comes here with no special presumption in its favor. Article V, § 18(h), of the State Constitution expressly provides that we may totally reject the recommendation, if in our view, it is "just and proper" to do so. In sum, it is the obligation of this Court to determine a judicial officer has in fact breached the trust reposed in him and the appropriate sanction for such a violation.

In exercising its responsibilities the Court can, and does, reject the Board's view of the Record, see *Chiovero, supra*, including the credibility of the testimony, see *In re Braig*, 520 Pa. 409, 554 A.2d 493 (1989); *In re Sylvester*, 521 Pa. 300, 555 A.2d 1202 (1989).

[8] The careful, detailed review by the Board of the testimony of Judge Ross who was a Board Member and a material witness, see, *e.g.* Pet. App. pp. 23-29, 37-63, is a full answer to Petitioner's allegations that the Board can not fairly evaluate the evidence of its own members. Moreover, to accept Petitioner's contention would be to hold that the Board was disqualified from taking disciplinary actions in any matter in which one of its members had relevant, material information.

Petitioner's allegations that Judge Ross participated in a review of the underlying facts of the complaint she made

In *Keiser v. Bell* the Federal District Court for the Eastern District of Pennsylvania was faced with a case in which the then Executive Director of the J.I.R.B. had sworn out the complaint, had participated as a member of the fact-finding committee, and had voted as a J.I.R.B. member on the recommendation for discipline. Judge Higginbottam held the "commingling" due process argument to be "plainly insubstantial", given the "clear separation of preliminary investigative and final adjudicatory functions." 332 F.Supp at 619.[9]

In *Witherow v. Larkin*, 421 U.S. 35 (1975), this Court found no due process violations in the procedures of a state licensing board that first issued formal findings of fact and conclusions of law asserting probable cause to believe that the petitioner had engaged in various acts prohibited by the statutes and then, as it had the power to do, proceeded to finally adjudicate the matter and impose punishment. We would note again that the Judicial Inquiry and Review Board can not issue final adjudications and this distinction is a critical and conclusive

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against Petitioner (Pet.App., pp. 16 and 17) are in error. Judge Ross recused herself from any participation in the proceedings involving Petitioner once it was determined that the inquiry into his conduct would include allegations concerning the contact with Judge Ross. See Appendix, *infra*, p. 1.

[9] In contrast, the present Executive Director and General Counsel did not and does not sit as a member of the Board or any of its committees, did not bring the complaint, did not vote and did not otherwise participate in the deliberations of the Board concerning its legal rulings, its findings of fact, or its proposed recommendations. Nor did the Executive Director and General Counsel exercise any other adjudicative function. The state Constitution, Article V, Section 18(b) set forth *supra*, at page 2, provides that the Board shall act only with a concurrence of its members. Any orders and other rulings signed by Counsel were issued only at the direction of the Board and following the necessary approval.

one. *Witherow* also specifically approved and reaffirmed this Court's holding in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948), which is also dispositive of the issues raised by Petitioner.[10]

Petitioner's attempt to avoid the compelling authority against his contention by alleging that the Court below did not conduct a *de novo* review of the record asks this Court to assume that the Pennsylvania Supreme Court failed to exercise its constitutionally mandated responsibilities, responsibilities it has repeatedly recognized and stressed, see note 7, *supra*, and the cases there

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[10] Among the arguments rejected by this Court in *Cement Institute* was petitioner's claim that it was a denial of due process for the commission to pass on the issue of alleged violations of the anti-trust laws by petitioner on the grounds that the Commission had, in public statements including Congressional testimony, expressed the belief that petitioner's conduct had violated the law. In rejecting this contention, the Court noted that the fact that the Commission's members had entertained such views as a result of prior *ex parte* investigations did not mean that the minds of the Commission's members were made up and did not require disqualification of the Commission (*Id*, at 700-703). The Court also stated that:

> " . . . [No] decision of the Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although those issues involve questions both of law and fact. Certainly, the . . . Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." (*Id*, at 703.)

cited. There is absolutely no basis for such an assumption.[11]

The order of the Court accepting a part of the Board's recommended findings and agreeing with the recommended sanction specifically states that the order was issued "after review of the record and due consideration of the brief and arguments . . . " (Pet. App. p. 7). In its order denying reargument, the Court stated: "There is no basis for the claim in the application for reargument that we failed to conduct a *de novo* review." (Pet. App. p. 1).

II. THE AMENDMENT OF THE DISCIPLINARY CHARGES INVOLVING PETITIONER DOES NOT RAISE CONSTITUTIONAL ISSUES.

As set forth in more detail in the Counterstatement, *supra*, pp. 6-9, during the evidentiary hearings upon the original two charges of judicial misconduct that had been filed against Petitioner, additional information was developed independent of the hearings then being conducted before a three person hearing panel of the Board which resulted in the issuance of three additional charges by amendment to the original Notice of Institution of Formal Proceedings. At the time of the issuance of the three additional charges, Respondent had not testified at the

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[11] While Petitioner notes that the Court has, in other matters, issued opinions discussing the record, he fails to note that the Court has also, in other cases, issued orders accepting or approving the Board's Report and Recommendations, even in cases resulting in removal. See the orders in *In re Morgo*, Pa. Supreme Court JIRB Docket No. 139, filed November 28, 1991, and in *In re Stewart*, Pa. Supreme Court JIRB Docket No. 148, filed January 27, 1992. Moreover, the Court's opinion below incorporated the detailed and extensive Board report which it accepted.

hearing,[12] and the evidentiary hearings on the additional charges did not commence until approximately five months after their issuance. Petitioner's challenges to this procedure on double jeopardy and due process grounds have no basis in law or fact and do not merit review by this Court.

A. There is no Legal or Factual Basis for Petitioner's Double Jeopardy Claim.

The constitutional prohibition against double jeopardy applies to criminal matters and prohibits *criminally* punishing twice, or attempting to punish twice, for the same criminal offense. More to the point, the prohibition applies *only* to criminal matters, see *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972) and see *Lowery v. Com. Pa. State Police*, 108 Pa.Comwlth. 183, 529 A.2d 589 (1987); *Com. Pa. State Police v. Swaydis*, 504 Pa. 19, 470 A.2d 107 (1983).

While, as Petitioner notes, judicial disciplinary proceedings have been referred to as *quasi*-criminal in nature, such disciplinary proceedings are neither civil nor criminal, but are *sui generis*. The focus of such proceedings is not the punishment of an individual, but the

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[12] Nor had any other evidence been presented which related to the additional charges. As Petitioner himself notes (Pet. p. 7), the charges pertained "to entirely different times, places, subject matter and parties from the times, places subject matter and parties allegedly involved in [the original two charges]".

As set forth above, Counterstatement pp. 6-9, the additional charges did involve, as did one of the original charges, *ex parte* communications with a lower court judge concerning matters before the lower court, but the communications in question were with a different judge and involved different cases, though one of the three did involve an attorney also involved in the *ex parte* communications in the original charges.

protection of the integrity of our judicial system and the preservation of the public's confidence in that integrity. See *e. g., Keiser v. Bell,* 332 F. Supp 608 (E.D. Pa. 1971); *Matter of Probert,* 411 Mich. 210, 308 N.W.2d 773, 777, note 10 (Mich. 1984); *Complaint Concerning Winton,* 350 N.W.2d 337, 342 (Minn. 1984); and *In Re Haggerty,* 241 S.2d 469, 474 (La. 1970).

As the federal court stated in *Keiser v. Bell, supra,* referring to the respondent Board (332 F. Supp. 608, 616):

> The proceedings of the Judicial Board are investigatory and advisory and are not binding upon the Supreme Court. No determination of criminal guilt is made, but merely a determination of the Judicial Board's view of the conformity of the subject of investigation to the state constitutional standards for judicial office. Similarly, the resulting Order of the Supreme Court does not operate as a sanction for criminal guilt but as a judgment on judicial fitness. At most, the proceedings of the Judicial Board could be characterized as quasi-judicial administrative hearings, and the Order of the Supreme court as a judicial disciplinary order.

Judicial disciplinary proceedings are *not* criminal proceedings and double jeopardy does not apply. See, e.g., *Matter of Probert, supra,* 308 N.W. 2d at 776, note 7; *In re Inquiry of Kelley,* 238 S.2d 565, 570 (Fla. 1970); *In re Inquiry of Lee,* 336 S.2d 1175, 1177 (Fla. 1976).

Moreover, Petitioner was not tried twice on the same charges. Under the procedures provided for the Respondent Board by the Court on which Petitioner sits, the Board is permitted to develop a hearing record before a panel of at least three Board members (see Rule 5, *supra,* p. 4). At the conclusion of the hearing, the panel reports to the Board at which point the *Board* makes findings and ultimately decides, based on its review of the record of the proceedings, if there is good cause to recommend

discipline to the Supreme Court (See Rules 9 and 14, *supra*, pp. 4-5).

As detailed in the Counterstatement, *supra*, pp. 6-9, when Petitioner objected to the issuance of the additional charges against him, the Board, following argument before it, issued an order (Pet. App. p. 268) in which it found that the charges had been issued correctly and properly pursuant to its rules (see Rule 8, *supra*, p. 4). The order also provided that the charges would be consolidated with the original charges and all charges would be heard *ab initio* by the entire Board eligible to sit. However, when the hearings resumed, the new *en banc* hearing panel, in granting a continuance due to Petitioner's counsel's unavailability, asked that Petitioner advise the Board what parts, if any, of the record of the previous hearing he expected to enter into the record of the hearing before the *en banc* panel. When the continued hearings resumed, Petitioner chose to go forward from the point of the end of the hearings before the three member panel. (See Notes of Transcripts for November 14, 1988, and March 13, 1989, set forth in the Appendix, *infra*, pp. 3a-4a). In short, Petitioner was not tried twice on the original two charges, but was procedurally in no different posture than if the three new charges had been heard in a separate hearing and the Board, in accordance with its Rules, had then considered the record of both hearings and made its ultimate determination.

B. THE ADDITIONAL CHARGES RAISE NO DUE PROCESS OR OTHER CONSTITUTIONAL ISSUE.

The factual context and the procedural considerations just discussed, pp. 18-19 and pp. 20-21, *supra*, also apply to Petitioner's remaining attack on the issuance of additional charges. As just noted, during a break in the proceedings below, the Board issued additional charges

which resulted from information developed independently of the hearing. Petitioner's claim that the Board violated its own Rules and his vague, general claims of prejudice and due process and other constitutional violations, like his double jeopardy claim, have neither legal nor factual bases.

The Board's action was taken pursuant to Rules 2 and 8 of the Board's Rules of Procedure (See pp. 3, 4, *supra*) which provide as follows:

> RULE 2. NOTICE OF FORMAL PROCEEDINGS
>
> (a) After the investigation has been completed, if the Board concludes that formal proceedings should be instituted, the Board shall without delay issue a written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him . . .
>
> RULE 8. AMENDMENTS TO NOTICE OR ANSWER
>
> The Board, *at any time prior to its determination,* may allow or require *amendments to the notice of formal proceedings* and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense *against the matters charged thereby.* (Emphasis added.)

When the additional charges were issued, formal proceedings had, of course, already been instituted. Therefore, the charges were issued pursuant to Rule 2 *and* Rule 8. While Rule 2 specifies the procedures to be followed to file charges and *initiate* formal proceedings, Rule 8 is

applicable once formal proceedings have, in fact, been initiated since it provides that the Board may allow or require amendments to the notice of formal proceedings and that such amendment may set forth additional facts, whether occurring before or after the commencement of the hearing. That the Rule permits the filing of additional charges is made clear by the Rule's requirement that "if such an amendment is made, the judge shall be given a reasonable time both to answer the amendment and to prepare and present his defense against *the matters charged thereby*". (Emphasis added.)

The intent and authority of Rule 8 is clear and the State Supreme Court, in promulgating the Rule, properly recognized the distinction between a member of the judiciary as to whom no proceedings had been instituted and one as to whom proceedings had begun. Moreover, the court, in promulgating the rule, followed similar or identical rules in other jurisdictions, rules that have been upheld in the face of challenges similar to Respondent's in every jurisdiction that has considered them.

In *In re Carrillo*, 542 S.W.2d 105, 108 (Tex. 1976), the Supreme Court of Texas, in applying a Rule virtually identical to those at issue, outlined the Judge's challenges and answered them as follows:

> Judge Carrillo complains that he was denied due process in this proceeding because the Notice of Preliminary Investigation dated May 2, 1975, related only to alleged misconduct in receiving gifts and engaging in certain business transactions with a party to a lawsuit pending in his court; that he had no similar notice in accordance with Rule 3(b) when five additional charges were preferred against him in the Notice of Formal Proceedings served upon him on July 18, 1975, or when six additional charges were included in the Commission's First Amended Notice of Formal Proceedings dated

October 8, 1975. He complains further that the total of eleven additional charges of misconduct were not properly a part of the proceeding commenced by the May 2nd notice; that the Commission failed to specify in ordinary and concise language the additional charges against him; and that it failed to follow other procedures specified by the Rules of this Court for Removal or Retirement of Judges.

We find no merit in these procedural complaints. Our Rule 3(b) provides for the Commission to give a notice of preliminary investigation before finally determining that formal proceedings shall be instituted. The purpose is to give the judge an opportunity to reply to the charges then before the Commission before it acts with respect to formal proceedings. Judge Carrillo filed his reply on May 13, 1975. This did not mean that the Commission was prevented from preferring additional charges in its subsequent notice of Formal Hearings and its First Amended Notice of Formal Hearings, or that it should start all over by incorporating all charges in a new Notice of Preliminary Investigation. It is clear from our Rule 4 that it was the Notice of Formal Proceedings which officially and formally commenced his proceedings. Nothing in our Rules nor the concept of due process requires that the pleadings instituting formal proceedings, or amendments thereto, need be limited to matters contained in the verified statement initially incorporated by the Commission in its Notice of Preliminary Investigation, so long as due notice is given concerning the additional charges. Rule 11 specifically provides that a Master, or the Commission, at any time prior to reaching a decision, "may allow or

> require amendments to the notice of formal proceedings . . . ". Rule 11 continues: "The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing." Judge Carrillo was given every notice required by the Rules. He had ample opportunity to reply and did reply to the sum total of the twelve charges that were made against him in the First Amended Notice of Formal Hearing filed with the Master on October 8, 1975.

The Supreme Court of California, applying rules again virtually identical to those at issue, see *Roberts v. Commission on Judicial Performance*, 190 Cal.Rptr. 910, 661 P.2d 1064 (1983), answered the contention of a judge-petitioner that he could not be disciplined on a matter – a contact with another judge – because the charge was not included in the notice of formal proceedings but was added during the masters hearing in the matter as follows:

> We further reject petitioner's assertion that the commission was foreclosed from relying upon his telephone conversation with Justice Puglia by reason of its failure either to include that charge in the original notice of proceedings, or to amend that notice. Rule 911 of the Rules of Court authorizes the commission or the masters, at any time prior to the conclusion of the hearing, to amend the notice to conform to proof or set forth additional facts, so long as the judge is given a reasonable time to respond and defend against the amended charges. We see no constitutional deficiencies in this procedure. (See *McCartney v. Commission on Judicial Qualifications*, 12 Cal.3d 512, 519, 116 Cal.Rptr. 260; 526

P.2d 268 (1974).) Petitioner had an ample opportunity to rebut the amended charges (661 P.2d at 1068-69).[13]

The Board acted properly in reliance upon the Rules promulgated by the state Supreme Court.[14]

In re Ruffalo, 390 U.S. 544 (1968), cited by Petitioner, does not support his argument. Indeed, the decision in *Ruffalo*, serves to underscore the correctness of the Board's actions in issuing the additional charges. The petitioner in *Ruffalo* was accused of misconduct in 12 counts, including two counts charging him with soliciting clients through an agent. At the hearing, both the petitioner and the agent testified that the agent only investigated cases for the lawyer, including cases involving the agent's employer-corporation. Thereafter, an additional count was added charging petitioner with hiring the agent to investigate his own employer, using only the testimony already produced. This Court reversed, holding that the proceedings "became a trap when, after they are underway, the charges are amended *on the basis of testimony of the accused.*" *In re Ruffalo*, 390 U.S. at 550, (Emphasis added) and observed that:

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[13] So too, did Petitioner. As noted above, pp. 6-9, *supra*. Petitioner had approximately 160 days to prepare to meet the additional charges.

[14] Respondent's characterization (Pet. p. 24) of the Board's actions as "extraordinary, unprecedented, illegal and unheard of" ignores not only the decisions in California and Texas but also the fact that, in adding additional charges, the Board was following its own precedents in prior cases. For example, additional charges were added in a number of the Board matters reviewed in *In re Cunningham*, 517 Pa. 417, 538 A.2d 473 (Pa. 1988), including charges that a particular respondent provided false information to the F.B.I. or invoked his privilege against self incrimination before the investigating grand jury. See also *In re Braig*, 520 Pa. 409, 554 A.2d 493 (1989), in which the charges were amended three times.

> " . . . [S]erious prejudice to petitioner may well have occurred because of the content of the original [charges] . . . He may well have been lulled 'into a false sense of security' . . . that he rebut charges 4 and 5 by proof that [the agent] was his investigator rather than a solicitor of clients. In that posture he had 'no reason even to suspect' that in doing so he would be, *by his own testimony*, irrevocably assuring his disbarment under charges not yet made." *Id* at 553, note 4

The facts here are simply not comparable to *Ruffalo*. The nature or theory of the charges of misconduct against Petitioner did not change in the midst of the proceedings as in *Ruffalo*, thus introducing elements of unfair surprise and entrapment elements which are totally lacking here.[15]

Also totally lacking is any specification of the manner in which Petitioner was prejudiced or deprived of due process or other constitutional protections and Petitioner's general, conclusory allegations (Pet. p. 29) are without merit. Thus, while Petitioner claims that the manner in which the original charges would have been met would have been substantially different, he does not specify how it would have been or how he was harmed.[16]

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[15] And, of course, the charges here were brought *before* Petitioner testified. In fact, concern with the concepts of *Ruffalo* and the fairness of avoiding "setting a trap" for Petitioner was considered by the Board in determining to bring the additional charges concerning additional *ex parte* contacts by Petitioner prior to his testimony in these proceedings.

[16] Of course, this is so because he can not. His defense to the three *ex parte* contacts charged in the additional charges, contacts he himself characterized as involving "entirely different times, places, subject matter and parties" (Pet. p.7) were that such contacts did not occur, the same defense he had entered as to the *ex parte* contact charged in the original charges. What claim can be made that defense would or could have been

As already noted, he had more than ample time, approximately five months, to prepare his defense to the additional charges.

Finally, Petitioner's claim that the additional charges improperly polluted and corrupted the proceedings below is conclusively answered by the considerations set forth in Argument I, above pp. 13-18, validating the combination in the Board of investigative, prosecutorial, and hearing functions[17] and by the fact that, as discussed in answering the double jeopardy claim, a particular hearing panel does not decide to make a recommendation to the State Supreme Court, the Board does. Under the State Constitution and the Rules, it is the Board and not a hearing panel or panels that must, on the basis of the record, make the formal findings as to whether or not misconduct has occurred, see Rule 9(b), p. 4, *supra*, ("Upon receiving the report of the Committee, the Board shall make its findings . . . ") and Rule 14, p. 4, *supra*, ("If the Board, upon consideration of the record of the proceedings, finds good cause, it shall recommend . . . discipline . . . ") Thus, whether the charges are filed

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different if the three additional charges had been issued at the same time?

[17] Given the importance of the resolution of judicial disciplinary matters and their focus – the protection of the integrity of the judicial system and the public's confidence in that integrity – certainly no argument can be made that the body charged by the citizens of the Commonwealth of Pennsylvania with the responsibility of pursuing allegations of judicial misconduct, the Respondent Board, is powerless to exercise that responsibility if the alleged failure to conform to the standards of judicial conduct is that of a jurist already involved in proceedings involving his or her conformance to the standards or his or her fitness for continued judicial office. The Board would have violated its constitutional responsibilities if it had failed to pursue any additional allegations concerning Petitioner's judicial conduct of which it became aware.

and the record made before one, two, or five panels, it is the *Board*, not the hearing panels, that must review that record and make the final determination for the Board as to whether or not the record establishes that misconduct has occurred and a recommendation should be filed with the Supreme Court. And, of course, it is the state Supreme Court, not the Board, that makes the ultimate adjudicative determination.

CONCLUSION

The proceedings below were in conformity with the Constitutional standards and the issues raised by Petitioner do merit this Court's review. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. KEUCH
Solicitor
Judicial Inquiry and Review Board

June, 1993

SUPREME COURT OF PENNSYLVANIA

BEFORE THE JUDICIAL INQUIRY
AND REVIEW BOARD

JUDICIAL INQUIRY AND REVIEW BOARD OF THE SUPREME COURT OF PENNSYLVANIA	:	
Petitioner,	:	Board Matter Number 140
v.	:	
JUSTICE ROLF LARSEN,	:	
Respondent.	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF DAUPHIN

BEFORE ME, the undersigned NOTARY PUBLIC, appeared one Robert L. Keuch, who, being personally known to me and having been placed under oath as required by law, deposed and said as follows:

1. My name is Robert L. Keuch. I am employed by the Judicial Inquiry and Review Board as Executive Director and General Counsel.

2. As Executive Director and General Counsel for the Board, I am responsible for the conduct of the investigations and inquiries which are undertaken to carry out the Board's responsibilities. I am also the official custodian of the records of the Board.

. . .

5. As Executive Director and General Counsel, I am aware, of course, of the actions taken by the Board on the

matters before them. In addition, I have reviewed the official minutes of the Board in preparation for the execution of this affidavit. My independent recollection and the records of the Board demonstrate that once Judge Ross was informed that an inquiry would be conducted into the contact by respondent with her, she recused herself from any participation in the inquiry or proceedings in this matter. Specifically, Judge Ross did not participate in a determination to issue a letter of inquiry to the respondent concerning her contact and has not participated in any discussion concerning the results of the inquiry and did not participate in the vote to authorize the formal charges in this matter.

/s/_____
Robert L. Keuch

STATE OF PENNSYLVANIA)
) SS
COUNTY OF DAUPHIN)

Sworn to and subscribed before me this 27th day of June, 1988.

/s/_____
Notary Public

SUSAN J. DORN, Notary Public
My Commission Expires
March 14, 1991
Harrisburg, PA Dauphin County

NOTES OF TRANSCRIPT
NOVEMBER 15, 1988

" . . . [S]o far as a continuance is concerned, the continuance is granted in light of Mr. Peruto's unavailability since he is engaged in a trial in progress in the Federal Court which will not be over until December 2nd.

We do want to, however, schedule some days for hearing, and we would appreciate it if you would ask Mr. Peruto and Justice Larsen if they would let us know what parts, if any, of the previous hearing they expect to enter into the record here without redoing it, if there is any. In fact, what I would propose is that we order Mr. Keuch to meet with Mr. Peruto or whoever Mr. Peruto designates to meet in his stead sometime during this continuance which will be granted, to reach agreement, if possible, on those parts of the record, if any, which respondent agrees should be made part of the record of this hearing, and so that it is clear, our order is that this hearing is *de novo* and, therefore, the respondent will have to consider what parts, if any, of the previous hearing on charges one and two should be made part of the record of this hearing, and I would ask that the Board be notified no later than December 23rd, which would give everybody adequate time after December 2nd to notify us what parts, if any, and I emphasize if any, the respondent would care to have made part of the record of this hearing."

NOTES OF TRANSCRIPT
MARCH 15, 1989

"Gentlemen, do you have stipulations regarding the record of the proceedings relating to charges 1 and 2?

MR. KEUCH: Yes sir. It's my understanding that the record to date before the original panel on charges 1 and 2 will be now made a part of this record, and will state for the record, that every member the present panel [sic], eight of you, have been provided, as requested by respondent's counsel, with the entire record to date.

It would be my intention to, then, since at the end of that record, the board had closed its case, to move to reopen the board's case and to present evidence this morning on charges 3, 4 and 5.

THE CHAIRMAN: Very well.

MR. PERUTO: I don't know if all the members of the panel have read it. It's a voluminous record. I will so agree that we incorporate by reference what has gone before."